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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re KEVIN F., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN F.,

Defendant and Appellant.

G040666

(Super. Ct. No. DL030196)

O P I N I O N

Appeal from an order of the Superior Court of Orange County,
Donna L. Crandall, Judge. Affirmed.

David K. Ries, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Chief Assistant Attorney General, Lilia Garcia and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

The juvenile court declared Kevin F., born in March 1992, a ward of the court under Welfare and Institutions Code section 602 after finding true beyond a reasonable doubt that Kevin had committed the crimes of being a minor in possession of a firearm, possession of an assault weapon, and street terrorism. The juvenile court also found true Kevin committed the two possession offenses for the benefit of a criminal street gang within the meaning of Penal Code section 186.22, subdivision (b)(1). We affirm.

Kevin contends substantial evidence does not support the juvenile court's findings. Substantial evidence showed that, on January 24, 2008, Kevin constructively possessed a Tec-9 assault weapon and was an active participant in the Logan Street gang. Substantial evidence also showed Kevin possessed the assault weapon to willfully promote, further, or assist in the felonious criminal conduct of Logan Street gang members within the meaning of Penal Code section 186.22, subdivision (a) and "for the benefit of, at the direction of, or in association with" Logan Street gang members "with the specific intent to promote, further, or assist" in the Logan Street gang members' criminal conduct within the meaning of section 186.22, subdivision (b)(1).

Kevin also contends the juvenile court erred by considering information it elicited from the deputy district attorney regarding the status of prosecutions against other individuals arising out of the incident upon which the alleged offenses were based. The record does not show the juvenile court improperly relied upon such information.

FACTS¹

I.

THE JANUARY 24, 2008 INCIDENT

On January 24, 2008, Detective Jose Becerra of the Santa Ana Police Department was working in an undercover capacity in an area in Santa Ana claimed by the Logan Street criminal street gang (Logan Street).² At approximately 6:00 p.m., Becerra observed eight males, including Kevin, standing in front of an apartment complex. At least some of them were members of Logan Street. He saw Kevin talking and loitering with the others in the group. Kevin was wearing a brown baseball cap, brown T-shirt, and a brown military-style belt with the letter “L” on the buckle; brown is Logan Street’s “gang color” and Kevin’s clothing was “indicative of a Logan Street gang member.”

Becerra testified that it appeared to him, based on his experience, the group was “posted up” outside the apartment complex, meaning the individuals, as a group, were patrolling the area for members of rival criminal street gangs, i.e., they were “guarding their area and claiming their turf.”

There had been some recent shootings involving Logan Street and its rival, the Krazy Proud Criminals criminal street gang (KPC). A member of “a smaller clique related to the KPC gang” had been shot within the previous 24-hour period, and retaliation by KPC against Logan Street was likely.

Becerra saw one of the males “mad-dogging” pedestrians and people in cars driving by, while the rest of the group supported him. Becerra explained that mad-

¹ The summary of facts is based on testimony given at the jurisdiction hearing.

² Detective Andy Alvarez of the Santa Ana Police Department testified that in his expert opinion Logan Street is an active criminal street gang. As of January 2008, Logan Street had about 60 active participants and its primary activities consisted of possessing firearms, stealing cars, and possessing drugs for sale. Kevin does not challenge the court’s finding that Logan Street is an active criminal street gang.

dogging involves challenging someone by staring at that person. If that person stares back, it is a sign of disrespect which is typically met with a violent response. It appeared to Becerra that members of the group were drinking an alcoholic beverage.

Becerra also observed an individual, later identified as Logan Street gang member Mario C., patrolling the area on a bicycle. Becerra saw Mario communicate with members of the group, then ride his bicycle up and down the street while looking around in all directions. Becerra testified, “[t]o my experience he was patrolling the area for other rival gang members.” Becerra testified that at one point, he saw Mario ride his bicycle on the sidewalk, Kevin walk toward Mario, and Kevin and Mario converse for about 30 seconds. Mario rode northbound out of Becerra’s view and then reappeared a few minutes later. Mario then walked away out of view while accompanied by another man later identified as Logan Street gang member, William N.; Becerra had seen Kevin interact with William that night as well.

Becerra reported to Detective Andy Alvarez that two individuals (Mario and William) had split from the main group. Two police officers attempted to contact Mario, but he ran away from them. Alvarez testified he joined in the pursuit of Mario and detained him after Mario unsuccessfully attempted to jump over a block wall. Alvarez had received a report that Mario had thrown a gun “from his person.” From a small shrub area next to the block wall, Alvarez recovered a Tec-9 assault weapon, a loaded magazine containing 20 rounds, and one loose bullet. Mario had concealed the weaponry inside of his pants or under his shirt. After marked police cars appeared, “all the subjects,” including Kevin, ran inside the apartment complex. Kevin was not arrested until three weeks later on February 14.

Mario was taken into custody immediately. Mario told Alvarez that the assault weapon was an automatic firearm and that he had shown it to other Logan Street gang members.

Alvarez also spoke with William, who told Alvarez that he had been associating with Logan Street and knew about the gun. Alvarez asked William whether Logan Street gang members in the company of another gang member who possessed a gun would know that member possessed a gun; William answered, “they would know.” After being shown a photograph of the assault weapon recovered by Alvarez that night, William told Alvarez it was “Logan’s gun” and wrote “Logan’s gun” followed by his initials below the photograph.

At the jurisdiction hearing, William testified that he had pleaded guilty to felony possession of a semiautomatic assault weapon in March 2008 after having been arrested on January 24 because “[h]e and some other guy got busted for shooting a firearm in the neighborhood.” He testified he was a Logan Street gang member, he had been “hanging outside” with Kevin that night, and he knew Mario had the assault weapon. William authenticated the photograph of the assault weapon and his handwriting stating “Logan’s gun.” He identified it as the weapon he and Mario “got caught with.” William testified, “[i]t was the neighborhood’s gun for protection,” that “if one of [his] homies had some trouble with another gang member, . . . that person [could] use that gun,” and “[a]s a gang member, . . . it [is] important for [him] to know when one of [his] homeboys has a gun.” He also stated that the gun is made available to other gang members, but then stated only to older individuals.³

William testified he knew Kevin “from the streets” for about three years. William testified he also knew Kevin since they were “little kids.” William said he did not know Kevin by a nickname and did not know whether Kevin was a gang member.

Alvarez testified he spoke with Kevin on February 14, 2008. Kevin denied being a gang member. He denied knowing Mario, but also told Alvarez he knew Mario

³ Mario told Alvarez he had the gun for protection and would not let any of his “homies” borrow it.

had a weapon. Kevin told Alvarez that if one member of the gang had a gun, the other gang members would know about the gun.

II.

TESTIMONY REGARDING KEVIN'S STEP ACT NOTICES

Alvarez testified regarding the 10 notices Kevin had received from the Santa Ana Police Department under the California Street Terrorism Enforcement and Prevention Act (STEP Act) (Pen. Code, § 186.20 et seq.). Each notice informed Kevin that Logan Street was a criminal street gang and members of that gang commit crimes enumerated within Penal Code section 186.22, subdivision (e).

Kevin's first STEP Act notice was dated August 11, 2007. A police officer contacted Kevin in Logan Street's claimed territory. Kevin told the officer he had not been "jumped into" the gang, but had been "kicking it" with Logan Street gang members.

Kevin was given a second STEP Act notice at 1:00 a.m. on October 28, 2007, while in Logan Street's claimed territory. A police officer asked Kevin, "[h]ow long have you been kicking back with Logan?" Kevin responded, "[f]or about two months." Alvarez testified that based on his background, training, and experience, "kicking back" means Kevin was "someone who [wa]s trusted within the inner circle of the gang," and thus permitted to associate with the gang members. Kevin was wearing a brown shirt and black shorts at the time.

A police officer contacted Kevin in the presence of a Logan Street gang member and issued a third STEP Act notice to Kevin on November 1, 2007. The officer's contact was in connection with his investigation of Logan Street graffiti. Kevin told the officer he had been kicking it with Logan Street but had not been jumped into the gang.

On November 10, 2007, Kevin was loitering with Logan Street gang members; he was wearing a black hooded sweatshirt, brown T-shirt, tan pants, and white

shoes. He was issued a fourth STEP Act notice by a Santa Ana police detective. Kevin told the detective, “I used to live here, so Logan is where I’m from. They call me ‘Speed’ or ‘Speedy’ because I’m fast. Logan has always hated Lops . . . and KP Chongos. I kick it with my hood sometimes. It’s my hood, you know. Our color is brown.” Alvarez testified “Lops” is a derogatory name for the Lopers street gang in Santa Ana, and “Chongos” is a derogatory name for KPC.

On December 13, 2007, Kevin was again contacted by a police officer; Kevin was wearing a brown baseball cap, which had the word “Logan” written on the inside, and a brown cloth belt with the letter “L” on it. During his communication with the officer, who issued Kevin his fifth Step Act notice at that time, Kevin stated, “he kicks back with Logan but doesn’t know the guys’ names.”

Kevin received his sixth STEP Act notice on December 16, 2007, while he was in the company of two Logan Street gang members and was within Logan Street’s claimed territory. Kevin stated to the police officer who issued the notice that he “had been kicking back with Logan Street gang for about six months and he would back . . . up Logan gang members.”⁴ Kevin also identified Logan Street’s rivals as the Lopers and KPC, and stated Logan Street “gets along” with the Delhi criminal street gang. He stated Logan Street’s color is brown and he has a couple of friends who kick back with Logan.

Kevin received his seventh STEP Act notice on January 24, 2008. The record is not clear whether he received this notice before, during, or after the events that occurred starting at 6:00 p.m., described *ante*. In any event, Kevin stated he had been kicking back with Logan Street for six months and that “they” call him “Speedy.” As described *ante*, Kevin was “representing Logan” by wearing its gang color.

⁴ Alvarez testified that the term “backing up” means “a way of one person who is trying to get into the gang or make their bones with the gang, to show that they are—that they’re willing to do what they need to do to help out the gang when they’re needed. They will back them up; they will have their back if they need some help.”

During his contact with a police officer on February 1, 2008, Kevin received his eighth STEP Act notice. He told the officer he had “walked into” Logan Street three months earlier and also commented, “Logan currently has a beef with KPC.”

A week later, on February 8, Kevin was again contacted by a Santa Ana police detective while in the company of at least one active member of Logan Street and received his ninth STEP Act notice. He told the detective that he had been kicking back with Logan Street for three months.

Kevin was issued a 10th STEP Act notice a few days later, on February 14. He told the police officer who issued the notice that he had been “from Logan Street” for “[a]bout three months.”

III.

GANG EXPERT TESTIMONY

Alvarez testified that in his expert opinion, on January 24, 2008, Kevin was an “active criminal street gang participant.” His opinion was “[b]ased on this investigation that [he] conducted, the conversations [he] had with [Kevin], the background investigation [he] conducted on [Kevin], the gang notices [he] reviewed, police reports, evidence recovered during a search warrant at [Kevin]’s house, and statements made by other individuals.” Alvarez testified that based on his training, background, and experience, an individual who was not an active participant in Logan Street would not be permitted to “hang out” in Logan Street’s claimed territory, while dressed in a brown baseball cap, brown shirt, and brown belt with the letter “L” on the buckle. He explained, “by hanging out in that neighborhood and if you are not part of the gang, you are going to probably meet some sort of violent confrontation by people who are members of the gang. Not just any average person can stand out there on the street wearing those gang colors or gang indicia.”

Alvarez also testified regarding the “gang gun theory.” He stated, “when a gang member is in possession of a firearm, it is common knowledge for the other gang members that he is around to know that he has a gun; and that gun is used for—or is up for grabs and can be used by anybody in the gang. [¶] And if the person who has the gun is shot or hurt or goes down, another gang member can go get that gun and use that gun for whatever.” He testified the ultimate symbol of power and respect within the gang is a gun and “respect is earned by possessing a gun.” He stated, “[i]t goes to protection, for one. If gang member ‘A’ is armed and the other gang members know that; and if gang member ‘A’ gets hurt—gets shot in a driveby shooting and he goes down, the other gang members would know that he had a gun. They can go retrieve it from him and use it for protection or aggression, whatever it may be.” Alvarez testified the weapon recovered after Mario threw it into a shrub is “particularly valued by gang members or active gang participants on the street . . . [¶] . . . [¶] . . . because it is a firearm, first and foremost. [¶] Second to that would be the look or the appearance of the firearm. It has sort of a menacing look to it, more so than just the average handgun or so. [¶] . . . [T]he amount of ammunition that it can hold, that it can fire. It’s a large-capacity magazine, can hold more rounds than the average pistol. . . . [I]t’s an automatic weapon so it can fire rapidly, a lot of rounds rapidly.”

Alvarez further testified that based on his background, training, and experience, it is common and almost necessary for gang members to pass firearms around for the purpose of concealing them from law enforcement and making sure they are available to whoever in the gang needs to use the firearm. Alvarez stated that if gang members “need to go do what is commonly referred to as a ‘mission’ within the gang subculture, if they go do a mission, they’ll know who has the gun so they can use that gun to go commit a crime. Or they’ll need to know who used the gun so they can dispose of the gun if need be.” He further stated that younger members within a traditional Hispanic street gang try to garner more respect by “putting in a lot of work” by “represent[ing]

their gang whether it's verbally, by their dress, wearing colors, doing missions, . . . [¶] . . . hold[ing] firearms . . . [¶] . . . [¶] . . . pass[ing] firearms.” Alvarez testified younger gang members might be asked to keep firearms at their residences. It is also common for gangs to have members who are not on probation or parole, and thus not subject to search and seizure conditions, hold the gang's weapons to lessen the risk of seizure of the weapons by law enforcement.

The deputy district attorney asked Alvarez for his expert opinion regarding a hypothetical scenario resembling the circumstances that existed the evening of January 24. Alvarez testified that under such circumstances, Logan Street would benefit from the possession of an assault weapon because the gang would be armed and the gang members would know there is a firearm that is ready to use in case a rival gang, such as KPC, appeared in their neighborhood.

IV.

KEVIN'S TESTIMONY

Kevin, who was 16 years old at the time of the jurisdiction hearing, testified that he is not a member of Logan Street, does not know Mario, and did not know anything about the weapon found in Mario's possession. He explained that he had been living in Michigan before returning to Orange County in May or June 2007 at which time he started to look up old friends.

Kevin testified the “L” on the belt buckle of the brown belt he was wearing on January 24 stood for his mother's middle name. He admitted he was wearing a brown baseball cap. He stated he never “kick[s] it with Logan” Street, does not have any friends who are gang members, and has never hung out with a gang member as far as he knows. He further stated none of his friends associates with Logan Street or KPC. When asked whether he had told Alvarez that when one person had a gun, all of the other gang members know, Kevin said he did not remember saying that. He also denied the

substance of most of the statements Alvarez testified he had made when he received the STEP Act notices from police officers.

BACKGROUND

In April 2008, the district attorney filed an amended petition alleging that on January 24, 2008, Kevin committed the following felony offenses: (1) possession of a firearm by a minor in violation of Penal Code section 12101, subdivision (a)(1) (count 1); (2) possession of an assault weapon in violation of section 12280, subdivision (b) (count 2); (3) carrying a loaded firearm in public by a gang member in violation of section 12031, subdivision (a)(1) and (2)(C) (count 3); and (4) street terrorism in violation of section 186.22, subdivision (a) (count 4). As to counts 1, 2, and 3, the amended petition alleged Kevin committed each offense for the benefit of, at the direction of, and in association with Logan Street, a criminal street gang, with the specific intent to promote, further, and assist in criminal conduct by members of that gang, within the meaning of section 186.22, subdivision (b).

After the deputy district attorney rested his case during the jurisdiction hearing, Kevin moved to dismiss the petition pursuant to Welfare and Institutions Code section 701.1. The court denied Kevin's motion.

The juvenile court found the allegations of the amended petition as to counts 1, 2, and 4 true beyond a reasonable doubt. The court also found the gang enhancements as to counts 1 and 2 true beyond a reasonable doubt. The court stated its findings as follows: "In assessing the testimony of the minor, originally on direct I thought that he was a somewhat credible witness in saying that he is not a gang member or that he doesn't bang. [¶] But on cross-examination, the answers to the questions asked by [the deputy district attorney] were beyond incredible. The fact that he testified that the 'L' on his belt buckle stood for his mother's middle name strains credibility beyond the point of no return. [¶] The fact that he denied making not just a[n] occasional statement

on an occasional STEP notice but on every one of them. It is impossible for this court to believe that every time this minor was contacted by an officer from the Santa Ana Police Department, that he didn't say any of the things that they said he said; that every single time, the statements were created or they were a figment of the officer's imagination. [¶] Because of that, I cannot find any of his testimony to be credible, and I do not find any of his testimony to be credible. [¶] That ruling which I made in a premature manner I will repeat. The court will find beyond a reasonable doubt that the allegations of Counts 1 through 4 and the enhancement pursuant to Penal Code Section 186.22[, subdivision](b) as it relates to Counts 1 and 2 to be true beyond a reasonable doubt. As to Count 3, that allegation is stricken.” The court struck count 3 and its concomitant gang enhancement.

The juvenile court declared Kevin a ward of the court under section 602 of the Welfare and Institutions Code, and placed him on formal supervised probation. The court further ordered Kevin “committed to the care, custody and control of the Orange County probation officer for commitment to juvenile hall or appropriate facility for 65 days to receive credit for 65 days previously served.”

Kevin appealed.

DISCUSSION

I.

SUBSTANTIAL EVIDENCE SUPPORTED THE JUVENILE COURT'S DENIAL OF KEVIN'S MOTION TO DISMISS.

Kevin argues substantial evidence did not support the juvenile court's denial of his motion to dismiss under Welfare and Institutions Code section 701.1.⁵ He

⁵ Welfare and Institutions Code section 701.1 provides: “At the hearing, the court, on motion of the minor or on its own motion, shall order that the petition be dismissed and that the minor be discharged from any detention or restriction therefore ordered, after the presentation of evidence on behalf of the petitioner has been closed, if the court, upon weighing the evidence then before it, finds that the minor is not a person described by

argues insufficient evidence showed he (1) knew Mario possessed a gun; (2) knowingly exercised control over Mario's gun; (3) was an active participant in a criminal street gang; and (4) willfully promoted, furthered, or assisted in felonious criminal conduct by a criminal street gang.

A.

Applicable Standards of Proof and Review

The test to be applied by the juvenile court in ruling on a Welfare and Institutions Code section 701.1 motion to dismiss is not the same as an appellate court's substantial evidence standard of review. (*In re Andre G.* (1989) 210 Cal.App.3d 62, 65.) "A section 701.1 motion is properly *reviewed* under the substantial evidence standard. [Citation.] Section 701.1 is, however, 'substantially similar to Penal Code section 1118.' [Citation.] The Legislature clearly intended section 701.1 to be analogous to Penal Code section 1118. [Citation.] Thus, 'the rules and procedures applicable to section 1118 . . . apply with equal force to juvenile proceedings.' [Citation.] [¶] In an adult criminal nonjury trial, Penal Code section 1118 requires the trial court to weigh the evidence, evaluate the credibility of witnesses, and determine that the case against the defendant is 'proved beyond a reasonable doubt before [the defendant] is required to put on a defense.' [Citation.] This is clearly the standard for the juvenile court as well." (*Id.* at pp. 65-66; see *In re Anthony J.* (2004) 117 Cal.App.4th 718, 727.)⁶

In reviewing the juvenile court's denial of Kevin's motion to dismiss, we "review the entire record in the light most favorable to the judgment to determine

Section 601 or 602. If such a motion at the close of evidence offered by the petitioner is not granted, the minor may offer evidence without first having reserved that right."

⁶ Kevin does not argue on appeal that the juvenile court failed to apply the correct standard of proof in ruling on his motion to dismiss. Indeed, the court's comments made before it denied the motion, quoted in the Discussion section, part I.B *post*, show the court applied the correct standard by weighing the evidence, making credibility determinations, and determining the deputy district attorney had proved his case beyond a reasonable doubt.

whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.]” (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if “‘upon no hypothesis whatever is there sufficient substantial evidence to support’” the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

B.

Substantial Evidence Showed Kevin Constructively Possessed the Assault Weapon.

Kevin argues, “[t]here was insufficient evidence presented at the jurisdiction hearing to show Kevin knew [Mario] possessed a gun on January 24, 2008.” He argues substantial evidence failed to show he (1) knew Mario had the assault weapon on him that night or (2) knowingly exercised control over that weapon. (See *People v. Azevedo* (1984) 161 Cal.App.3d 235, 243 [a person constructively possesses a weapon if he or she knowingly has the right of control over it, either directly or through another person or persons]; see also CALCRIM No. 2500 [“A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it /[or] the right to control it), either personally or through another person”].)

Before denying Kevin’s motion to dismiss, the juvenile court stated: “This case is more troubling to the court than probably it should be, but it is. [¶] Again, I get the gang culture, and I understand the knowledge and the constructive possession. And I understand that Kevin F[.] was contacted about 10 times between August of 2007 and early February 2008 and asked questions about his gang affiliation. [¶] And every time, he was either wearing the colors or indicated that he was kicking it with Logan Street or had been walked into Logan Street. He is clearly involved in the gang culture: no question about that. Whether he’s actually a member, I don’t know. But he is certainly

intimately involved with Logan Street. [¶] He was at that apartment complex. I believe Detective Becerra in terms of having seen this minor talking to [Mario]; I think he did. Whether he had access to that gun, I think he knew about it. I don't think that any of those individuals standing on that apartment doorstep didn't know about that gun. There was clearly something going on. [¶] I'm pretty well convinced that he knew that had he needed it, he could have had it. [¶] I'm not one hundred percent comfortable with this decision, but I'm comfortable enough to say that my doubt, the doubt that I have, is not a reasonable doubt. I do have doubt, but I'm not saying that it's a reasonable doubt."

1. *Substantial evidence showed Kevin knew Mario had the assault weapon.*

Substantial evidence supported the court's finding Kevin knew Mario had the assault weapon on his person on January 24, 2008. Kevin admitted as much to Alvarez when he was arrested on February 14.

In addition, the evidence showed Kevin was an active participant in Logan Street and, as an active participant, he would have known that Mario, a Logan Street gang member, had the weapon in his actual possession that night. Kevin's active participation in Logan Street was shown by Kevin's conduct and admissions from August 2007 through February 2008. Substantial evidence showed Kevin had been issued 10 STEP Act notices, which had been triggered by his association with Logan Street gang members, during the six-month period leading up to his arrest. During the contacts in which he received those notices, Kevin made several admissions showing his active involvement in Logan Street, including that he had been kicking it with Logan Street gang members for several months, would back up Logan Street gang members if needed, and had been "walked into" Logan Street three months before he received his eighth STEP Act notice on February 1, 2008.

In 2007 and 2008, Kevin was repeatedly contacted by police officers in Logan Street's claimed territory, often wearing brown—Logan Street's gang color—and

often in the company of Logan Street gang members. On January 24, 2008, Kevin was observed hanging out with a group of Logan Street gang members, wearing a brown T-shirt, a brown baseball cap, and a brown belt with the letter “L” on the buckle; he and his companions appeared to be “posted up” outside an apartment complex in Logan Street’s claimed territory. Alvarez testified that, in general, a person would not be permitted to hang out in Logan Street’s claimed territory while wearing the gang’s color unless he or she was an active participant of the gang. Alvarez also offered his expert opinion that Kevin was an active participant in Logan Street.

Thus, the record shows Kevin’s participation in Logan Street was ““more than nominal or passive.”” (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509; see *People v. Castenada* (2000) 23 Cal.4th 743, 753 [“evidence of the crimes defendant here committed, his many contacts on previous occasions with the Goldenwest criminal street gang, and his admissions by bragging to police officers on those occasions of gang association or membership” proved the defendant’s active participation in a criminal street gang]; see also *In re Jose P.* (2003) 106 Cal.App.4th 458, 467-468 [minor admitted associating with criminal street gangs; had been contacted by police on several occasions in the company of known gang members; wore gang colors; had been involved in crimes for the benefit of the gangs; and had told the police, “if his fellow gang members had asked him to do something, he would not be a chicken”].)

Alvarez also testified that when one gang member is in possession of a gun, it is usually the common knowledge of other gang members that the member has a gun. Mario told Alvarez that he had shown the firearm to other gang members. William told Alvarez he knew about the gun. Kevin and William each told Alvarez that if one member of the gang had a gun, the other gang members would know about it. That the gun was the gang’s gun, not Mario’s personal weapon, was further supported by William’s testimony that the assault weapon was “Logan’s gun.”

Furthermore, Becerra observed Kevin conversing with Mario before Mario was arrested and the assault weapon was recovered by Alvarez. Thus, the juvenile court's finding Kevin knew Mario had the gun was supported by sufficient evidence.

2. *Substantial evidence showed Kevin knowingly had the right to exercise control over the assault weapon.*

Substantial evidence also supported the juvenile court's finding Kevin knowingly had the right to exercise control over the assault weapon. William testified the assault weapon was "Logan's gun." He explained the gun was the "neighborhood's gun for protection" and that "if one of [his] homies had some trouble with another gang member, . . . that person [could] use that gun." Alvarez also provided expert testimony that it is "common knowledge" that the gang gun "is up for grabs and can be used by anybody in the gang" and "if the person who has the gun is shot or hurt or goes down, another gang member can go get that gun and use that gun for whatever."

Citing *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*), Kevin argues Alvarez's expert testimony was insufficient to establish Kevin's constructive possession of the assault weapon. *Killebrew* is inapplicable. In *Killebrew*, the appellate court held an expert witness may not testify that a specific individual had specific knowledge or possessed a specific intent. (*Id.* at p. 658.) Here, Alvarez did not testify regarding Kevin's specific intent or whether Kevin knowingly had the right to control the assault weapon. Instead, Alvarez's testimony addressed "the *expectations* of gang members in general when confronted with a specific action." (*Ibid.*; see *People v. Gonzalez* (2006) 38 Cal.4th 932, 946-947 [reading *Killebrew*, "as merely 'prohibit[ing] an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial'"].)⁷

⁷ Kevin further argues, "[d]espite being directed to the *Killebrew* opinion, the court in Kevin's case allowed the prosecutor to solicit, and Detective Alvarez to testify, on the same subjects deemed improper by the *Killebrew* opinion: 'that a gang would expect

The circumstances of the evening of January 24, 2008 show Kevin was involved in the activities of Logan Street. He and other Logan Street gang members were “posted up” in front of an apartment complex in Logan Street’s claimed territory. Mario, armed with an assault weapon, appeared to be patrolling the streets looking for rival gang members. Becerra observed Kevin leave the group of Logan Street members to speak with Mario (although Kevin testified he did not know who Mario was). Kevin repeatedly admitted that he had been “kicking back” with Logan Street, which, Alvarez explained, meant in gang culture, Kevin was “trusted within the inner circle of the gang.”

After oral argument, we granted Kevin’s request to vacate submission to allow supplemental briefing on the Court of Appeal, Fifth Appellate District’s recent decision in *People v. Ramon* (2009) 175 Cal.App.4th 843 (*Ramon*). In *Ramon*, a deputy sheriff was on patrol when he recognized a truck that had been reported stolen and initiated a traffic stop. (*Id.* at pp. 846-847.) The defendant, who was driving the truck, pulled over. (*Id.* at p. 847.) The deputy found an unregistered handgun under the driver’s seat of the truck. (*Ibid.*) Although the defendant was a member of a criminal street gang, neither the defendant nor his passenger made any gang signs or attempted to gain possession of the gun. (*Ibid.*) The defendant was convicted of, inter alia, receiving stolen property, being a felon in possession of a firearm, and carrying a loaded firearm. (*Id.* at p. 848.) The jury found the gang enhancement true that the defendant committed each of those offenses for the benefit of a criminal street gang. (*Ibid.*)

retaliation as a result of shooting’ [citation]; ‘that in a confrontation more than one gang member may share a gun in some identified circumstances[’] [citation]; and ‘that oftentimes gang members traveling together may know if one of their group is armed’ [citation].” But, the appellate court in *Killebrew*, *supra*, 103 Cal.App.4th at page 658 stated expert testimony on these points “would have been admissible.” The court stated, “[b]eyond that, [the expert] simply informed the jury of his belief of the suspects’ knowledge and intent on the night in question, issues properly reserved to the trier of fact.” (*Ibid.*)

The only evidence offered at trial in support of the gang enhancement was the testimony of an expert witness who relied only on two facts in forming his opinion—that both the defendant and his passenger were members of a criminal street gang and that they were stopped within the territory claimed by their criminal street gang. (*Ramon, supra*, 175 Cal.App.4th at p. 849.) “From these two facts, along with the crimes the two were accused of committing, [the expert] opined that the crime was committed for the benefit of the . . . criminal street gang and was intended to promote the [gang]. [The expert]’s opinion was based on his belief that because the gun and the stolen vehicle could be used to facilitate the commission of a crime, and the [criminal street gang members] commit crimes, the two must have been acting on behalf of [that criminal street gang].” (*Ibid.*)

The appellate court found insufficient evidence supported the gang enhancement in *Ramon*. (*Ramon, supra*, 175 Cal.App.4th at p. 853.) The court stated that evidence the defendant was with another gang member in his gang’s claimed territory, “standing alone, [was] not adequate to establish that [the defendant] committed the crime with the specific intent to promote, further, or assist criminal conduct by gang members. While [the defendant] may have been acting with this specific intent, there is nothing in the record that would permit the People’s expert to reach this conclusion.” (*Id.* at p. 851.) The court further stated: “Simply put, in order to sustain the People’s position, we would have to hold as a matter of law that two gang members in possession of illegal or stolen property in gang territory are acting to promote a criminal street gang. Such a holding would convert [Penal Code] section 186.22[, subdivision](b)(1) into a general intent crime. The statute does not allow that.” (*Id.* at p. 853.)

In his supplemental letter brief, Kevin argues: “Just as the court held in *People v. Ramon* that there were insubstantial underlying facts for the expert witness to opine Ramon was acting for the benefit of a gang, so was there insufficient evidence in [Kevin]’s case for the expert witness to testify [Kevin] exercised control over another

person's gun or had any right to control that gun. [Citation.] . . . In the present case, Detective Alvarez used the facts [Kevin] was in gang territory with known gang members on the night of his arrest to opine Kevin knowingly controlled a gang member's gun under the 'gang-gun theory' he presented to the court."

But *Ramon, supra*, 175 Cal.App.4th 843 is distinguishable from the instant case. As discussed *ante*, the finding Kevin knowingly had the right to exercise control over the gun was not solely supported by evidence Kevin was in Logan Street's claimed territory in the company of Logan Street gang members or by any expert testimony solely based on such evidence. Here, unlike *Ramon*, that finding was supported by evidence showing, inter alia: (1) the assault weapon at issue was "Logan's gun" which was available to all members; (2) Kevin was an active participant in Logan Street on January 24; (3) Kevin admitted that if one member of a gang had a gun, the other gang members would know about it; (4) on January 24, Kevin was not merely in the presence of other Logan Street gang members, but with members whose conduct reflected they were "posted up" outside an apartment complex while Mario patrolled the area on his bicycle; (5) Kevin was wearing a brown baseball cap, brown T-shirt, and a brown military-style belt with the letter "L" on the buckle (Logan Street's color is brown); (6) Kevin knew Mario had a weapon; and (7) Kevin conversed with Mario before Mario was arrested and the weapon was recovered (although Kevin denied knowing Mario).

Substantial evidence showed Kevin knowingly had the right to exercise control over the assault weapon.

C.

Substantial Evidence Supported the Juvenile Court's Findings As to Street Terrorism and the Gang Enhancement.

Kevin argues the juvenile court's findings he committed street terrorism in violation of Penal Code section 186.22, subdivision (a), and committed the two alleged possession offenses "for the benefit of, at the direction of, or in association with" Logan

Street with the specific intent to “promote, further, or assist in any criminal conduct by gang members” within the meaning of section 186.22, subdivision (b)(1) are not supported by substantial evidence. Kevin contends insufficient evidence showed he (1) actively participated in Logan Street, and (2) willfully promoted, furthered, or assisted in felonious criminal conduct. For the reasons discussed, *post*, we disagree.

The crime of street terrorism under Penal Code section 186.22, subdivision (a) requires the district attorney to show active participation in a criminal street gang. As discussed in detail in the Discussion section, part I.B.1, *ante*, substantial evidence showed Kevin was an active participant in Logan Street. The gang enhancement codified at section 186.22, subdivision (b)(1) does not contain that element.⁸

Substantial evidence also showed Kevin willfully promoted, furthered, or assisted in Logan Street’s felonious criminal conduct. Alvarez’s expert gang testimony included the following explanation on how constructive possession of a firearm benefits a criminal street gang:

“Q [the deputy district attorney] And lastly, Detective, I’m going to ask you to assume a certain set of facts. [¶] I want you to assume that there are approximately five to ten known Logan Street gang members that are hanging out outside of an apartment. This apartment is within the Logan Street territory and it is within a territory that borders a rival gang, which is Krazy [Proud] Criminals. [¶] Assume that

⁸ Penal Code section 186.22, subdivision (a) provides: “Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail” Section 186.22, subdivision (b)(1) provides enhanced penalties for “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members”

one of those individuals possesses an assault weapon that is loaded. Could you tell us how this would benefit Logan Street[?]

“A It would benefit them in the sense that they are—the gang is armed, and they are all congregating within their gang neighborhood in front of an apartment complex. And they all would know that there is a firearm among them and it is ready to be used in case a rival gang such as KPC would come through the neighborhood.

“Q Okay. When you say they all would know, what are you basing that opinion on?

“A I’m basing that on the fact that gang members will know who has a gun when they’re in a group, because it’s common for them to talk about it or let each other know who has a gun and who is holding the gun and where that person is when they’re in the group.”

In light of Alvarez’s expert testimony combined with evidence of Kevin’s active participation in Logan Street and conduct the night of January 24, substantial evidence showed he possessed the assault weapon to willfully promote, further, or assist in the felonious criminal conduct of Logan Street gang members within the meaning of Penal Code section 186.22, subdivision (a) and “for the benefit of, at the direction of, or in association with” Logan Street, “with the specific intent to promote, further, or assist” in Logan Street gang members’ criminal conduct within the meaning of section 186.22, subdivision (b)(1).

II.

THE RECORD DOES NOT SHOW THE JUVENILE COURT IMPROPERLY CONSIDERED INFORMATION ABOUT SEPARATE PROSECUTIONS ARISING FROM THE EVENTS OF JANUARY 24 IN MAKING ITS FINDINGS.

Kevin argues his due process rights were violated at the jurisdiction hearing because the juvenile court improperly inquired about the status of other prosecutions arising out of the events of the evening of January 24. Kevin contends he “was clearly

prejudiced by the court's consideration of information about other prosecutions resulting from Mario C[.]'s gun possession. Assured by the prosecutor's representation other people arrested on January 24, 2008 had pled guilty to charges similar to the allegations against Kevin, the court was persuaded to find the allegations true in the absence of sufficient evidence. Though the court expressed concerns Kevin was not culpable, the knowledge others pled guilty prejudiced the court."

Kevin's argument is based on the following discussion that occurred between the juvenile court, the deputy district attorney, and Kevin's counsel during the deputy district attorney's argument opposing Kevin's motion to dismiss the proceeding under section 701.1 of the Welfare and Institutions Code:

"The Court: What is troubling the court is not the whole gang culture. I understand that; I've got that. But there were eight or more individuals, according to Detective Becerra, hanging out in front of that apartment complex on January 24th. And [Mario] was riding back and forth on his bicycle.

"A couple of the remaining eight were seen to approach him, talk to him, go back to whatever they were doing in front of the apartment complex. And then [Mario] left and I believe [Kevin] went with him—not [Kevin]—[Mario] and [William] left. Then there were these three minors who were arrested.

"What happened to the other five or six or so; and why were these three, the other two being [minors], singled out as opposed to the others?

"[The deputy district attorney]: As an officer of the court, I've handled all the matters, Your Honor. And while it's not in evidence at this time, all the other gang members contacted at the scene, with the exception of two, still have pending cases. All the others have pled: most to state prison based on this gun.

"The Court: Okay.

"[The deputy district attorney]: I guess the court does have before it that William N[.] pled guilty to possessing this gun.

“The Court: Absolutely.

“[The deputy district attorney]: But by no means were these juveniles singled out. That’s just the evidence the court has before it.

“The Court: Right.

“[The deputy district attorney]: And again—

“The Court: It just sort of left a hole.

“[The deputy district attorney]: Right. I can represent that Diego S[.] pled guilty to 180 days and—

“[Kevin’s counsel]: I’m going to object to this. This is beyond the scope of our trial.

“The Court: And I will apologize to you, [Kevin’s counsel], but it was a curiosity question that I had. And I don’t, [the deputy district attorney], want you to go into the details. Suffice it to say, they were arrested and criminal proceedings are ongoing?

“[The deputy district attorney]: Absolutely, yes.

“The Court: That’s fine.”

The record shows the juvenile court was interested in whether the other individuals standing outside the apartment complex had been prosecuted, not because such information was relevant to whether the deputy district attorney had proved the case against Kevin, but for the reason, as expressed by the court, that it was curious whether Kevin had been singled out, not for the purpose of determining the truth of the allegations of the amended petition. The juvenile court told the deputy district attorney not to provide it any details. The record does not support Kevin’s contention that the juvenile court relied upon the information provided by the deputy district attorney in sustaining the petition. The record shows, by the court’s apology to Kevin’s counsel, that the court realized its inquiry was not relevant. We presume the juvenile court properly followed

the law and did not consider as evidence matters that were not admitted into evidence in making its findings; the record does not reflect otherwise. We find no error.

DISPOSITION

The order is affirmed.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.